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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1312

MARY ANN TURNER,

Petitioner,

—v.—

DEPARTMENT OF EMPLOYMENT SECURITY and BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH,

Respondents.

PETITIONER'S REPLY BRIEF

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Petitioner's Reply Brief

To avoid collision with this Court's decision in Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974), respondents have abandoned the prime justification for the statutory classification tendered in the court below, i.e., the relationship of pregnancy to "employability." Their Brief in Opposition hypothesizes a wholly different legislative rationale, one patterned on the Court's opinion in Geduldig v. Aiello, 417 U.S. 484 (1974).

Before the Utah Supreme Court, respondents stated:

> [N]ear term pregnancy is an endemic condition relating to employability and hence is not covered by the program. Defendants' Brief at 11 (emphasis supplied).

That court embraced respondents' defense of the classification based on the assumed relationship between pregnancy and "employability." It stated:

> Should a man be unable to work because he was pregnant, the statute would apply to him. . . . App. to petition at 3a (emphasis supplied).

In stark contrast to their former position, and without any reference to legislative history or the grounds of decision in the Utah forum, respondents now disclaim the "employability" justification and substitute for it "insurance principles":

> The State policy implicit in the limitation of coverage rests for its rationale, not upon employability or lack thereof of pregnant individuals, but upon a larger scheme founded upon selection or exclusion of risks upon insurance principles. Brief in Opposition at 12 (emphasis supplied).

At the very least, this belated articulation of state purpose should attract close scrutiny. For respondents' initial formulation, the one accepted by the Utah Supreme Court, suggests "the possible role of outmoded taboos" in shaping the legislature's judgment. Cf. Cleveland Board of Education v. LaFleur, supra, at 641 n.9.

This case, like LaFleur, involves the right of pregnant women fully fit to work [1/] to count as full members of the labor force. It does not involve, as Aiello did, risk coverage choices for state disability insurance purposes. No presumption as to the ability or disability of pregnant women was involved in Aiello. Such presumption

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1/ Not as persons whose current commitment to gainful employment is nonexistent or highly problematic: "students, pensioners, the voluntarily unemployed . . . fraud feasors, strikers, etc." Brief in Opposition at 12.

clearly, and illegally, operates here. 2/

Finally, respondents' old and new rationalizations for the challenged classification underscore the need of lower courts for clear statement by this Court whether LaFleur or Aiello controls the rights of pregnant women while they remain fit and capable workers. 3/

CONCLUSION

The petition for certiorari should be granted.

2/ Like the presumption operative in LaFleur, and unlike the categorization upheld in Weinberger v. Salfi, 95 S. Ct. 2457 (1975), the statute here at issue directly burdens the exercise of "protected freedoms" and arbitrarily impinges upon a "vital area" of an individual's "constitutional liberty." LaFleur, supra, at 640.

3/ It is undisputed that petitioner's pregnancy did not render her unable to work during the period for which she claimed benefits.

Respectfully submitted,

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